STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1246

State of Minnesota,
Respondent,

vs.

Antonio Eduardo Lopez Navarro,
Appellant.

Filed August 28, 2023
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CR-21-19398

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Sarah J. Vokes, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Kirk M. Anderson, Anderson Law Firm, PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Worke, Judge; and Connolly, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant challenges his criminal-sexual-conduct conviction, arguing that the district court plainly erred by admitting the show-up identification evidence. We affirm.

FACTS

In August 2021, M.M. was at a bus stop with her two young children. Appellant Antonio Eduardo Lopez Navarro approached M.M. from behind carrying food items. He asked M.M., "Do you want to f--k?" M.M. replied, "No. What the h--l." Navarro rubbed M.M.'s body and pulled at her underwear through her pants. Navarro then began pulling on M.M.'s "bra and tried to . . . pull on it from the back."

Navarro's conduct continued for about five minutes until M.M. called 911. Navarro picked up his food items and ran away. M.M. reported Navarro's conduct to the 911 dispatcher. M.M. provided a description of Navarro, his clothing, what he was carrying, and the direction he fled. M.M. called a friend to come watch her children while she spoke to police. M.M. got into the squad car to attempt to locate Navarro. M.M. directed police to the area she had seen Navarro run. Police and M.M. found Navarro "sitting on a bench eating." M.M. confirmed to police that Navarro was the man from the bus stop.

Respondent State of Minnesota charged Navarro with fifth-degree criminal sexual conduct. A jury found Navarro guilty as charged. The district court imposed a 365-day sentence, stayed for two years conditioned on Navarro serving 190 days in the workhouse. This appeal followed.

DECISION

Navarro argues that the district court plainly erred by admitting unobjected-to show-up identification evidence. The state contends that Navarro forfeited his right to challenge the admission of the evidence because he failed to make this challenge in a

pretrial motion or objection at trial. Alternatively, the state argues that Navarro's claim fails on the merits.

Appellate courts generally review a district court's evidentiary decisions for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). However, whether an identification procedure is so suggestive as to violate due process is reviewed de novo. *State v. Hooks*, 752 N.W.2d 79, 83 (Minn. App. 2008).

To preserve a claim that certain evidence should be excluded, the defendant must "timely object[]" and "state[] the specific ground of objection." Minn. R. Evid. 103(a)(1). "When a criminal defendant challenges a witness's identification, district courts must conduct a pretrial omnibus hearing or midtrial hearing to resolve the challenge." *State v. Jones*, 977 N.W.2d 177, 189 (Minn. 2022). A district court is not required to make sua sponte determinations concerning witness-identification procedures when "no challenge to the identification was raised before the district court." *Id.* Therefore, without a challenge raised, a defendant's admissibility-of-evidence arguments are considered waived. *State ex rel. Rasmussen v. Tahash*, 141 N.W.2d 3, 14 (Minn. 1965).

Navarro did not challenge the show-up identification evidence by pretrial motion nor did he object to the admission of this evidence at trial. The record shows that Navarro requested an omnibus hearing, and the district court scheduled the hearing for December 6, 2021. However, there is no record of the December 2021 hearing taking place. Generally, appellate courts do not decide "issues which are not first addressed by the [district] court and are raised for the first time on appeal even if the issues involve constitutional questions regarding criminal procedure. This is especially true when the record is not fully

developed." *State v. Bonkowske*, 957 N.W.2d 437, 445 (Minn. App. 2021) (quotations omitted). But the reviewing court's discretion allows for "deviat[ion] from this rule when the interests of justice require consideration of such issues and doing so would not unfairly surprise a party to the appeal." *Id.* (quotation omitted).

Assuming, without deciding that the interests-of-justice exception applies to Navarro's failure to challenge the show-up identification procedure in district court, we nonetheless conclude that the claim fails on its merits.

Because Navarro did not object to the state's identification evidence at trial, we review the district court's admission of the evidence for plain error. *See State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012) (reviewing unobjected-to challenge for plain error). To establish plain error, Navarro must demonstrate that the admission of the show-up evidence constitutes error, the error was plain, and the error affects his substantial rights. *Id.* "An error is plain when it is clear or obvious." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotation omitted). An error affects a criminal defendant's substantial rights "if there is a reasonable likelihood that the error substantially affected the verdict." *Id.*; *see also State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011) (stating that "analysis under the third prong of the plain error test is the equivalent to a harmless error analysis").

We apply a two-prong test to determine whether pretrial identification evidence violates due process and must be suppressed. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, we determine whether the identification procedure was unnecessarily suggestive. *Id.* Even if the procedure was unnecessarily suggestive, the evidence may be admissible under the second prong if "the totality of the circumstances establishes that the

evidence was reliable." *Id.* In other words, the second prong involves a determination of "whether the suggestive procedures created a very substantial likelihood of irreparable misidentification." *Id.*

Suggestiveness of the identification

A one-person show-up identification procedure, as is the case here, is not always unduly suggestive. *State v. Taylor*, 594 N.W.2d 158, 161-62 (Minn. 1999). However, the "very nature" of a one-person show-up identification is suggestive. *Id.* at 162. Here, the show-up identification does not appear unduly suggestive. But even assuming that it was suggestive, Navarro's claim fails to satisfy the second prong.

Likelihood of irreparable misidentification

To evaluate the totality of the circumstances under the second prong of this test, the reviewing court must consider the following factors:

1. The opportunity of the witness to view the criminal at the time of the crime;
2. The witness'[s] degree of attention;
3. The accuracy of the witness'[s] prior description of the criminal;
4. The level of certainty demonstrated by the witness at the [identification procedure];
5. The time between the crime and the confrontation.

Ostrem, 535 N.W.2d at 921. If the totality of the circumstances demonstrates "an adequate independent origin" for the witness's identification of the defendant, then the identification evidence need not be suppressed despite the suggestive nature of the procedure. *Taylor*, 594 N.W.2d at 161.

Opportunity to view the perpetrator

Whether a witness had a good opportunity to view a perpetrator is evaluated based on the amount of time that the witness viewed the perpetrator, *State v. Jones*, 556 N.W.2d 903, 913 (Minn. 1996), and if the witness saw the perpetrator "during daylight hours from relatively close range." *Ostrem*, 535 N.W.2d at 922.

M.M.'s encounter with Navarro lasted for about five minutes, during the daytime, and from close range—within arm's reach. Navarro was close enough to M.M. that he was able to grab M.M.'s body and clothing. Given the length of time M.M. saw Navarro, his proximity to her, and the time of day the incident took place, M.M.'s opportunity to view Navarro favors the admission of the show-up identification evidence.

Degree of attention

Whether a witness "was coherent, aware, and attentive" are considered when analyzing if a witness's attention was impaired in some way. *State v. Adkins*, 706 N.W.2d 59, 63 (Minn. App. 2005). This court has previously determined that when a strange and suspicious event occurs, the witness is often led to pay more attention to their surroundings. *See, e.g.*, *State v. Lushenko*, 714 N.W.2d 729, 733 (Minn. App. 2006), *rev. denied* (Minn. Dec. 12, 2006).

M.M. was approached by Navarro, a stranger, while she waited at a bus stop with her two small children. Navarro's criminal sexual conduct continued for several minutes until M.M. called 911. Our review of the record does not show that M.M.'s attention or awareness was in any way impaired during Navarro's criminal sexual conduct. The degree-of-attention factor favors the admission of the show-up identification evidence.

Accuracy of prior description

A witness's description of the perpetrator does not need to be perfectly accurate. *See Seelye v. State*, 429 N.W.2d 669, 673 (Minn. App. 1988) (stating that witness's description was "on the whole, accurate" even when the height was wrong and witness did not notice a mustache but "accurately described the clothes worn, facial features, complexion, hair and weight").

M.M. told the 911 dispatcher that the perpetrator was wearing a black shirt, shorts, a black "snap back" hat, appeared to be in his 20's, was either Hispanic or Asian, and was carrying food. She also reported the direction he fled once she called 911. This description was consistent with what M.M. told police when they arrived on scene. M.M. got into the squad car and drove with police in the direction she saw Navarro flee. Police saw a man matching this description sitting on a bench eating food in the general direction M.M. stated the perpetrator fled. M.M.'s description of Navarro was detailed and consistent with the dispatcher and police; as such, the description of her assailant was sufficiently accurate to favor the admission of the show-up identification evidence.

Level of certainty

During her testimony, M.M. was asked if she got "a good look" at Navarro. M.M. confirmed that she did. M.M. recounted riding in the squad car to attempt to identify the perpetrator. As the squad car approached a man sitting on a nearby bench, M.M. testified that police asked her "if that was him," and she confirmed that it was the man from the bus stop. The prosecutor asked, "At the time that [M.M.] identified [Navarro], was there any doubt in [her] mind that [she] had identified the correct person." M.M. replied, "No, there

wasn't." M.M.'s testimony shows that she was relatively certain that Navarro was the perpetrator. The level-of-certainty factor favors the admission of the show-up identification evidence.

Elapsed time

Generally, when less than 48 hours have elapsed between the witness's observation and the identification of the perpetrator, the identification evidence is considered reliable. *Ostrem*, 535 N.W.2d at 922.

M.M. testified that she arrived at the bus stop sometime after 6:30 p.m. According to body-camera footage, the police officers arrived at the bus stop just before 6:50 p.m. M.M.'s identification of Navarro took place shortly after 7:00 p.m.—less than one hour after Navarro's criminal sexual conduct. Given the time between the criminal sexual conduct and the identification, the identification is considered reliable. This factor favors the admission of the show-up identification evidence.

Each of the five factors supports the reliability of M.M.'s show-up identification. Because, based on the totality of the circumstances, M.M.'s identification of Navarro was independently reliable, the district court did not plainly err when it admitted the show-up identification evidence.

Affirmed.